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(8)

No. 05-11284

IN THE
SUPREME COURT OF THE UNITED STATES

JALIL ABDUL-KABIR, fka Ted Calvin Cole,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Were the special issue questions broad enough for the jury to adequately consider Cole's mitigating evidence about his mental impairment and childhood mistreatment and deprivation?

2. Has this Court overruled Fifth Circuit decisions that reject *Penry* error "whenever the former special issues might have afforded some indirect consideration of the defendant's mitigating evidence?"

3. Does the Fifth Circuit's requirement that mental disorders be "severe, permanent, or untreatable" to warrant relief under *Penry* contradict this Court's rebuke of the "constitutional relevance" threshold test for mitigating evidence?

4. Did the prosecution prevent Cole's jury from fully considering and giving effect to Cole's mitigating evidence by imploring jurors to "follow the law," to "do their duty," and to answer the special issues on their own terms, without regard to the sentencing result?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas death penalty case. In 1987, Petitioner Jalil Abdul-Kabir, formerly known as Ted Cole, (hereinafter "Cole"), confessed to robbing sixty-six-year-old Raymond Richardson of twenty dollars and fatally strangling him because "it was quiter [sic] then [sic] shooting him and not as messy as cutting his throat, and it just seemed the easiest way to do it."[1] A jury found Cole guilty, reviewed his lengthy criminal history, and concluded that nothing in his history—not his neurological impairment, not his absentee parents, not his childhood hardships—was sufficiently mitigating to warrant a life sentence for the murder. Cole blames the Texas death-penalty statute and the prosecutors for that outcome. Specifically, he maintains that, had the Texas Legislature framed the special punishment issues differently, and had prosecutors not insisted that jurors "follow the law," his jury would have sentenced him to life. Cole also argues that the lower court incorrectly applied Supreme Court precedent in ruling that the special issue questions afforded the jury an adequate vehicle through which to consider his history and mitigating circumstances. But absent any substantial showing that the jury could not fully consider that evidence before rendering its punishment verdict, Cole's jabs at the special issue questions, the lower court's opinion, and the prosecution's closing statements offer not the slightest justification for this Court's intervention in this case. The petition should be denied.

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[1] *Cole v. Dretke*, 418 F.3d 494, 497 (5th Cir. 2005), *pet. filed* (March 30, 2006) (No. 05-11284); Appendix C at 13; 28 SR 42 (SX S-35 - autopsy report). "SR" refers to the state court record of transcribed trial proceedings, or statement of facts, preceded by volume number and followed by page number. "SX" refers to a State Exhibit entered at Cole's trial, followed by exhibit number.

STATEMENT OF THE CASE

I. Facts of the Crime

The facts supporting Cole's capital murder conviction are summarized in the lower court's published opinion as follows:

> In December 1987, Cole was staying at an abandoned motel with his stepbrother, Michael Hickey ("Michael"), and Michael's wife, Kelly Hickey ("Kelly"). Cole mentioned to the Hickeys that he was willing to kill someone to obtain cash. Cole and Michael decided to rob Kelly's grandfather, Raymond Richardson, and then strangle him to death.
>
> Two days after this conversation, Cole, Michael, and Kelly went to Richardson's home and visited with him in his living room for several hours. The group moved to the kitchen. As Richardson left the kitchen, Cole pushed him to the floor, where Richardson landed face down. Cole then sat on Richardson's back and strangled him with a dog leash that the men had brought to the house for this purpose. After Richardson died, the group put his body under his bed. They searched the house for cash, finding twenty dollars in Richardson's wallet. Michael took the money from the wallet, and Cole took the money to the grocery store to buy beer and bacon. Cole returned to Richardson's house and shared the groceries with Michael. The morning after the murder, Kelly and Michael surrendered themselves to the police and gave statements. Kelly eventually testified at Cole's trial.
>
> The police arrested Cole at Richardson's home the morning after the murder. Cole gave the police two statements in which he confessed to having murdered Richardson. The statements were introduced against Cole at trial. In one of these statements, Cole admitted that the group decided to strangle Richardson because "it was quiter [sic] then [sic] shooting him and not as messy as cutting his throat, and it just seemed the easiest way to do it." [On June 4, 1988,] [t]he jury found Cole guilty of the capital murder of Richardson while in the course of committing and attempting to commit robbery.[2]

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[2] *Cole*, 418 F.3d at 496-7; Tr 181. "Tr" refers to the transcript of trial papers that were filed with the convicting court during Cole's capital murder trial, followed by page numbers.

II. Punishment Evidence

At the punishment phase, Cole's jury addressed two issues: whether the killing was deliberate and whether "there was a probability that Cole posed a threat of future dangerousness."[3] In answering those questions, the jury was free to consider "all of the evidence submitted . . . in the full trial of this case"—guilt-innocence and punishment phases combined.[4] Given Cole's confession, and the nature of the crime, "deliberateness" appeared to be a given. And, as the Fifth Circuit noted, "[t]he State presented a strong case at the penalty phase"[5] that Cole would continue to be dangerous.

> . . . One of the State's main pieces of evidence was Cole's own diary, which was found in Richardson's home shortly after the murder. In this diary, Cole recorded his desire to "have" a 12-year-old boy named Cody, whom Cole described as "jail bait" . . . Cole also recorded his desire to find a companion "who is young, attractive and with a sense of adventure, with whom I can roam around the world, sailing in the South Pacific, the Caribbean, exploring the Mediterranean, partying somewhere in the South American jungles, smuggling, stealing, robbing, raping, pillaging, modern-day Vikings or pirates" . . . .
>
> The State introduced evidence to show that Cole was charged with the murder of Gary Don Dedecker approximately 15 years before the instant crime. This charge originally resulted in a mistrial. At one point before the trial, Cole told a bailiff that he had killed Dedecker and "would kill him again."

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[3] *Cole*, 418 F.3d at 502-3 (citing TEX. CODE CRIM. PROC. Art. 37.071(2)(b)).

[4] *Id.* at 502.

[5] *Cole v. Dretke*, 99 Fed. Appx. 523, 527 (5th Cir. 2004) (unpublished); *cert. granted, Abdul-Kabir v. Dretke*, 543 U.S. 985 (2004), *on remand*, 418 F.3d 494, *rhg en banc denied by Cole v. Dretke*, 443 F.3d 441 (5th Cir. 2006), *pet. filed* (March 30, 2006) (No. 05-11284).

Cole, who was 16 or 17 years old at the time, eventually pleaded guilty to this charge. Cole described Dedecker as his "best friend," yet he gave a statement to police in which he asserted that he murdered Dedecker because he wanted Dedecker's car. He [explained] . . . that he had killed Dedecker because he wanted to know what it was like to kill a person.

The State introduced evidence of a family friend who had let Cole stay in her home when he was 23 years old and had nowhere else to go. Cole molested this woman's eight-year-old son and the son's 10-year-old friend, and he was subsequently convicted of sexual assault charges based on these acts. The son, who was 15 years old at the time of trial, testified in detail as to the sexual acts Cole had performed on him and his friend.[6]

Defense counsel countered that evidence with mitigating testimony that:

- Cole's mother was an alcoholic and was unable to care for her children;
- Cole's father was arrested for attempting to rob a liquor store;
- Cole's father abandoned the family when Cole was five years old;
- Cole's mother moved into her parents' home with her children;
- Cole's grandparents were alcoholics and did not welcome the children;
- Cole was isolated from his peers because his grandparents lived eight miles out of town;
- School buses did not run to the grandparents' home, and the grandparents did not allow Cole's mother to borrow a car to drive Cole to school;
- Cole was placed in a children's home at age five;
- Cole's mother visited him only twice during his five-year residence at the children's home, and his father never visited; and
- Cole's uncle adopted Cole's brother, but did not adopt Cole.[7]

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[6] *Cole*, 99 Fed. Appx. at 528 (footnote omitted).

[7] *Cole*, 418 F.3d at 500.

The jury also heard testimony from Dr. Jarvis Wright, a mental health expert retained by defense counsel, that Cole's childhood was "very rugged," "tough," and "painful"; that Cole "never felt loved and worthwhile in his life," and that this background resulted in Cole's experiencing "chronic depression" and "terrific needs for nurturance."[8] Though Cole "started out in life with 'fantastic raw material,'" Wright explained, "the abandonment, neglect, and mistreatment that he suffered as a child left his personality 'very damaged' and 'horribly' distorted."[9]

Wright also testified that Cole has "diminished impulse control" because of his "organic neurological deficiency" that "very likely" indicated central nervous damage.[10] "Combine that and all the other factors of [Cole's] background, all these other things, we're going to have an individual with some real problems with impulse control."[11] Furthermore, according to Wright, "the combination of Cole's destructive childhood of neglect and abandonment had impaired his judgment and his ability to control his behavior . . . [and] Cole learned to cope with reality by living in a 'fantasy' world."[12]

But Cole's jury also learned that he was able to control his impulses. Indeed, as the lower court noted in its published opinion, Wright conceded that "even though Cole's diary demonstrated a 'fantasy' to behave like a 'modern-day Viking' or a 'pirate,' Cole was

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8 *Id.*

9 *Id.* at 500-1.

10 *Cole*, 418 F.3d at 501.

11 *Id.*

12 *Id.*

unlikely to act on such fantasies because he did not have the 'wherewithal' to do so."[13]

Wright similarly opined that Cole would become less violent over time:

> I think the research certainly indicates that individuals like [Cole], individuals who have had this kind of background, tend to begin to make changes at about forty, forty-five, fifty, somewhere in there. They tend to mellow a lot and change a good bit. You can infer that from some of the FBI statistics on age and changes in persons.
>
> But I think as we see him age, get older, hormones change, the process of aging takes over, as it does in all of us - and we all change. I think the evidence is overwhelming there that individuals who have behaved as he has change. They burn out. And I think there's a good chance of later in life—not now, but later in life—some changes.
>
> I'm suggesting that, as we grow older, we change; the compass points a different direction. We're tired. . . . our orientation is different. The research indicates that . . . this is the case with individuals who commit violent or antisocial acts.
>
> We also know from probabilities that, as people grow older, the probability of them becoming involved in violent acts decreases to the point of fifty, where the FBI statistics would indicate that they're almost - it almost doesn't happen. These behaviors have almost burned out of individuals. While they may be flaming while they're younger, they burn out later. So I don't have any specific statements for [Cole] as an individual. That would take a crystal ball. But for [Cole] as a . . . human being, we know this happens to human beings who are like [Cole], who have histories like [his]. We know from statistics that they change, as we do all change.[14]

Defense witness Dr. Wendel Dickerson also testified that Cole's violent tendencies were likely to decrease: "[W]hatever condition [Cole] is suffering from is not necessarily immutable and unchangeable. . . . [I]t can be changed . . . experience changes people.

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[13] *Id.* at 506.

[14] *Id.*

Changes in body changes people. . . . [J]ust because he's . . . considered dangerous today, does not necessarily mean he's going to be dangerous at some future point in time."[15] The jury answered "Yes" to both special issues.[16]

III. Course of Proceedings and Disposition Below

In accordance with the jury's guilt-innocence and punishment verdicts in June 1988, the trial court sentenced Cole to death for capital murder.[17] The Texas Court of Criminal Appeals affirmed the conviction and sentence in an unpublished opinion,[18] and this Court denied certiorari review.[19]

Cole then initiated state habeas proceedings in a twenty-one-claim petition alleging, among other things, that his jury was unable to consider his mitigating evidence under *Penry v. Lynaugh*, 492 U.S. 301 (1989) (*Penry I*).[20] The trial court recommended that relief be denied.[21] In particular, the court found that the punishment-phase evidence, "especially evidence from [Cole's] expert witnesses, provide a basis for the jury to sufficiently consider" Cole's mitigating evidence.[22] The Court of Criminal Appeals reviewed the record, adopted

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15 *Id.* at 506.

16 Tr 181.

17 Tr 170, 177, 180-82; 16 SR 569-71; 17 SR 896-902.

18 *Cole v. State*, No. 70,401 (Tex. Crim. App. Sept. 26, 1990).

19 *Cole v. Texas*, 499 U.S. 982 (1991).

20 SHTr 4, 25-138. "SHTr" refers to the state habeas transcript—the transcript of pleadings and documents filed during state habeas corpus proceedings—followed by page number.

21 SHTr 1-19.

22 *Id.* at 9.

the trial court's findings and conclusions (with two exceptions), and denied the petition in November 1999.[23]

On June 1, 2000, Cole filed submitted to the San Angelo Division of the United States District Court for the Northern District of Texas a federal writ petition that raised the following questions:

(1) Was Cole's jury able to consider and give effect to his mitigating evidence?
(2) Did the testimony from a court-appointed defense psychiatrist violate Cole's Sixth and Fourteenth Amendment rights?
(3) Was appellate counsel ineffective?
(4) Did the trial court deprive Cole of a fair trial by excluding testimony about his reasons for pleading guilty to a prior murder conviction?
(5) Was trial counsel ineffective for not investigating mitigating evidence?[24]

As to Claim 1, the district court first addressed whether the evidence of "destructive family background" and "organic neurological deficits" was "constitutionally relevant mitigating evidence" under Fifth Circuit precedent.[25] The district court ultimately found that both categories of evidence fell short of that standard.[26]

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[23] *Ex parte Cole*, Application No. 41,673-01 (Tex. Crim. App. Nov. 24, 1999); SHTr at Cover & at unpublished order.

[24] *Cole v. Johnson*, No. 6:00-CV-014-C (N.D. Tex.); Appendix C at 1, 5, 18, 25, 27, 30.

[25] *See* Appendix 2 at 9-13.

[26] *Id.* at 13-15 ("[N]o nexus was established between events in Cole's childhood and his later commission of the capital murder offense . . . [and] [t]he evidence is entirely insufficient to prove that Cole did, in fact, suffer from an organic neurological deficit", "was totally incapable of controlling his impulses," or "was somehow unable to distinguish right from wrong.").

Second, the district court explained that, regardless of its constitutional relevancy, the evidence Cole presented during his trial's penalty phase was fully within his jury's effective reach given the broad scope of the special issue questions.[27]

> Evidence of Cole's destructive family background evidence could be considered under the future dangerous special issue.
>
> Evidence of Cole's organic neurological deficiency could be considered under either the deliberateness or the future dangerousness special issues. Testimony regarding Cole's lack of impulse control was offered to explain the offense and demonstrate a capacity for change through his "outgrowing" the impulsivity over time. The relevance of this evidence to the future dangerousness inquiry of the second issue is readily apparent.[28]

Consequently, the district court found objectively reasonable the state court's finding that Cole's evidence was not beyond the scope of the special issues.[29] The court also found Cole's *Penry I* claim to be *Teague*-barred, and denied relief on March 6, 2001.[30] Cole moved to alter or amend the judgment, which the court denied. He then applied for a certificate of appealability (COA), which the district court also denied.[31]

On review to the Fifth Circuit Court of Appeals, Cole obtained COA on Claims 2 and 5. The appellate court also issued COA on its own motion regarding a procedural default

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[27] *Id.* at 15.

[28] *Id.* at 16 (citations omitted).

[29] *Id.*

[30] *Id.* at 17 ("To the extent Cole seeks a special jury instruction even though the evidence was within the effective reach of the jury, then he asks this Court to announce a new rule of constitutional law in violation of the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 310 (1989)."); Appendix C at 37.

[31] *Id.*

determination.[32] But no COA issued on the other claims, which included Claim 1—"a claim that the trial court's penalty-phase jury instructions were unconstitutional under [*Penry I*]."[33]

In denying COA on Cole's *Penry I* claim, the Fifth Circuit addressed only the *first* basis for the district court's denial—not the second.[34] In other words, the lower court did *not* initially address whether Cole's jury could have considered his mitigating evidence under the two special issues. Instead, the court applied its "nexus" test, concluded that Cole's evidence was not constitutionally relevant under that test, and declared that there was no need for it to address whether the jury could have fully considered such evidence within the scope of the special issues.[35] Once the evidence was deemed constitutionally irrelevant, the lower court considered the matter closed.[36] In May 2004, the lower court denied Cole's request for reconsideration and affirmed the district court's denial of relief.[37]

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[32] *Cole*, 99 Fed. Appx at 525.

[33] *Id.*

[34] *See Cole v. Cockrell*, No. 01-10646, slip op. at 6 (5th Cir. Aug. 13, 2003) (unpublished opinion holding that "Cole has not shown that jurists of reason could debate the correctness of the district court's determination that the nexus requirement applies to his *Penry* [*I*] claim").

[35] *Id.*, slip op. at 5.

[36] *Id.*

[37] *Id.* at 525, 533.

This Court granted certiorari review, vacated the Fifth Circuit's judgment, and remanded "for further consideration in light of *Tennard v. Dretke*, 542 U.S. 274 [] (2004),"[38] which had rejected the lower court's "constitutional relevancy" test for mitigating evidence.[39]

On remand, the lower court reversed, issued COA on Claim 1, and affirmed the district court's decision denying habeas relief.[40] This proceeding follows.

ARGUMENT

I. The Questions Presented For Review Are Unworthy Of The Court's Attention.

As provided in the Supreme Court Rules, certiorari review is not a matter of right, but of judicial discretion, and will only be granted for "compelling reasons."[41] Cole offers no compelling reason in this case, so this Court should deny his petition.

Furthermore, this is a federal habeas proceeding from the Fifth Circuit Court of Appeals. Consequently, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") controls the outcome of any requested review.[42] Under the Act's "highly deferential standard,"[43] no writ of habeas corpus is permitted on claims that were denied on their merits in state court unless the state-court adjudication—

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[38] *Abdul-Kabir*, 543 U.S. 985.

[39] *Tennard*, 542 U.S. at 284 ("The Fifth Circuit's ["constitutional relevancy"] test has no foundation in the decisions of this Court.").

[40] *Cole*, 418 F.3d at 494, 496.

[41] SUP. CT. R. 10 (West 2006).

[42] 28 U.S.C. § 2253(c) (West 2006).

[43] *Bell v. Cone*, 543 U.S. 447, 455 (2005) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997) and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) *(per curiam)*).

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[44]

The lower court properly found that "[t]hese conditions for the grant of federal habeas relief have not been established."[45] Accordingly, this Court should deny Cole's request for certiorari review.

II. Cole's Challenges to the Special Issues Are Without Merit.

Cole killed a man for twenty dollars—fatally strangled his victim with a dog leash, in fact—and after considering all of the evidence submitted at Cole's trial for that crime, a jury concluded that nothing in Cole's background was sufficiently mitigating to spare him from the death penalty. Specifically, Cole's jury found that he deliberately committed murder and that "there was a probability that [he] posed a threat of future dangerousness."[46] Given those findings, the trial judge was required by law to sentence Cole to death.[47]

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[44] 28 U.S.C. § 2254 (West 2006).

[45] *Brown v. Payton*, 544 U.S. 133, 136 (2005) (finding that the Ninth Circuit's grant of relief on a claim that petitioner's murder trial jury instructions did not permit full consideration of mitigating evidence was "contrary to the limits on federal habeas review imposed by 28 U.S.C. §2254(d)"); *Cole*, 418 F.3d at 505 ("[U]nder the instructions it was given, the jury could have considered and given effect to Cole's mitigating evidence under the future dangerousness special issue.").

[46] Tr 181.

[47] Tr 182.

Cole blames the Texas death-penalty scheme for that outcome. According to him, the two special issues inquiring as to Cole's "deliberateness" and "future danger" were not broad enough for the jury to fully consider his "extensive evidence that he was neglected, abandoned, and mistreated as a child, including evidence that one parent was an alcoholic and the other a criminal."[48] But the State tried and sentenced Cole under statutes and special issues that this Court has repeatedly upheld.[49] Moreover, Eighth Amendment claims turn on their facts, and in denying relief, the lower court keenly observed that this Court draws a "significant distinction between the type of evidence that Penry presented at his trial and the evidence that Cole presented at his[.]"[50] In a variety of cases involving evidence similar to Cole's, this Court upheld the same instructions and special issues Cole challenges here.[51] In

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[48] Petition at 17.

[49] *See Jurek v. Texas*, 428 U.S. 262, 272-73 (1976) (holding that Texas' punishment-phase special issue questions sufficiently allow Texas juries to consider a capital murder defendant's mitigating circumstances such as his criminal record (or lack thereof), the range of severity of that record, his youth, the circumstances of his crime, duress and mental or emotional disturbance, and remorse before sentencing him to death); *Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988) (reaffirming *Jurek*'s holding on this issue), *Franklin v. Lynaugh*, 487 U.S. 164, 182 (1988) (same). *See also Tuilaepa v. California*, 512 U.S. 967, 976-77 (1994) ("[T]he States have considerable latitude in determining how to guide the sentencer's decision in this respect.").

[50] *Cole*, 418 F.3d at 507.

[51] *Johnson*, 509 U.S. at 368 ("We believe that there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination."); *Graham v. Collins*, 506 U.S. 461, 463 (1993) (addressing mitigating evidence of youth, troubled childhood, and good character); *Franklin*, 487 U.S. at 168 (addressing prior good behavior while incarcerated); *Jurek*, 428 U.S. at 266-67 (deeming evidence of youth, intoxication, and good character to be mitigating). *See also Cole*, 418 F.3d at 509 (noting that this Court upheld in *Johnson* an instruction nearly identical to that submitted to Cole's jury).

light of that precedent, and the particular evidence Cole presented at trial, Cole cannot convincingly argue that his jury had no adequate "vehicle" through which to consider his circumstances and background before rendering its punishment verdict.[52] Accordingly, the Fifth Circuit correctly found his *Penry I Tennard I Smith*[53] challenges to the special issues to be without merit.

Nothing in the Fifth Circuit's opinion warrants review by this Court. First, on remand, the lower court abandoned its problematic "constitutional relevancy" test and found that, under "the low threshold for relevant mitigating evidence articulated by the *Tennard* Court," the evidence Cole presented regarding his "turbulent family background" and his lack of impulse control due to an "organic neurological deficiency" is relevant mitigating evidence."[54] Second, the lower court issued COA on Cole's *Penry I* claim (alleging that the special issues are not broad enough to have allowed Cole's jury to give full consideration and effect to his mitigating evidence) because "[i]n light of [this Court's] decision in *Smith* and the [circuit] opinion in *Bigby*[55] . . . jurists of reason could debate the district court's conclusion that Cole's mitigating evidence was not beyond the effective reach of the jury."[56]

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[52] *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (*Penry II*) (citing *Penry I*, 492 U.S. at 319, 328). *See also Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.").

[53] *Smith v. Texas*, 543 U.S. 37 (2004); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Penry II*, 532 U.S. 782; *Penry I*, 492 U.S. 302.

[54] *Cole*, 418 F.3d at 500-1.

[55] *Bigby v. Dretke*, 402 F.3d 551, 564-65 (5th Cir. 2005) (revising the Fifth Circuit's *Penry I* test in light of *Tennard*).

[56] *Cole*, 418 F.3d. at 502.

Third, addressing the merits of the claim, the lower court concluded that the special issues submitted to the jury sufficiently allowed for such consideration.[57]

In so ruling, the lower court distinguished *Penry I*, *Penry II*, *Smith* and *Tennard*, noted that these types of Eighth-Amendment cases turn on their facts, and explained that Cole's case presented no facts or evidence that were beyond the scope of the special issues in *his* case because, unlike the punishment evidence the petitioners in *Penry* and *Smith* presented at their trials, none of Cole's evidence was *aggravating*:

> Cole's reliance on *Penry I*, *Penry II*, *Tennard*, and *Smith* is misplaced. *Penry I* and *II* are readily distinguishable from this case. In *Johnson v. Texas*, the Supreme Court confirmed the limited scope of *Penry I* and *II*. Although the defendant in *Johnson* insisted that the Texas special issues prevented the jury from considering the mitigating effect of his youth, the Court rejected that argument and, in doing so, clarified *Penry*'s scope.
>
> In *Johnson*, the Court explained that in *Penry*, "there was expert medical testimony that the defendant was mentally retarded and that his condition prevented him from learning from his mistakes." As the expert testimony intimated that Penry was unable to learn from his mistakes, the *Johnson* Court concluded that the only logical manner in which Penry's jury could have considered the evidence of his mental retardation under the future dangerousness special issue was as an *aggravating* factor: Penry would remain a danger in the future because there was no chance that he would ever understand that rape and murder were wrong. Thus, Penry's jury was unable to give any mitigating effect to the mental retardation evidence that he proffered.
>
> Here, however, the mitigating evidence of Cole's destructive family background and organic neurological deficiency falls outside of *Penry*'s holding. With regard to Cole's mitigating evidence of "organic deficiency," the testimony proffered by two of Cole's own expert witnesses is directly contrary to the testimony at Penry's penalty phase that the *Penry* Court found aggravating.
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> . . . .

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[57] *Cole*, 418. F.3d at 505.

Neither *Tennard* nor *Smith* changes *Johnson*'s analysis of *Penry* . . .[58]

Crucial to the lower court's analysis is the fact that both Wright and Dickerson testified that Cole is likely to change over time.[59] "Unlike the evidence in *Penry*, Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes [and] [t]he record does not suggest that the jury viewed Cole's mitigating evidence as an aggravating factor only, *i.e.*, because he cannot learn from his mistakes, he will remain a danger in the future."[60]

Nor *could* the jury have given Cole's evidence such aggravating effect.

> The state prosecutor did not ask the jury to consider Cole's mitigating evidence as aggravating. Neither did he "press[ ] exactly the most problematic interpretation of the special issues, suggesting that [Cole]'s low IQ was irrelevant in mitigation, but relevant to the question whether he posed a future danger." Accordingly, Cole's prosecutor . . . did not place the jurors in the ethical dilemma of responding falsely to a special issue.[61]

Given Wright and Dickerson's punishment-phase testimony, "the jury could have believed them and found that, although Cole suffered a turbulent childhood and may suffer from diminished impulse control, he is capable of change and thus would not necessarily remain a danger in the future."[62] "[T]he jury could [also] have considered Cole's family background and organic deficiency evidence under—at the least—the future dangerousness special issue."[63] All of that evidence fits within the scope of the special issues, and the Fifth

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58 *Id.* at 505, 508 (citations omitted).

59 *Cole*, 418 F.3d at 506, 507.

60 *Id.* at 506-7.

61 *Id.* at 508.

62 *Id.* at 507-8.

63 *Id.* at 507.

Circuit was right to affirm the district court's alternative ground for denying relief on this claim.[64]

Any holding to the contrary would amount to "a wholesale abandonment of *Jurek*,"[65] which neither *Smith* nor *Tennard* suggest or purport to do. In neither case did this Court alter the rule of *Penry I* or undermine any of the valid Fifth Circuit cases that apply *Penry I* where constitutional relevance was *not* the *sole* basis for denying relief.[66]

III. There is no "Reasonable Likelihood" That Cole's Jury Applied its Instructions in a Way That Prevented it From Considering His Mitigating Evidence of "Destructive Family Background," Poor Impulse Control, and "Organic Neurological Deficits."

Relying heavily on *Smith and Penry II*, Cole next claims that the jury's punishment deliberations were tainted by improper voir dire and closing arguments that prevented the jury from giving meaningful effect to Cole's mitigating evidence within the scope of the special issues.[67] This argument is likely procedurally barred because Cole did not make this point in state court.[68] Regardless, "the claimed error amounts to no more than speculation"

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[64] *Id.* at 507.

[65] *Graham*, 506 U.S. at 476.

[66] *See Smith*, 543 U.S. at 43 (explaining that the Supreme Court's rejection of the Fifth Circuit's threshold standard for 'constitutionally relevant mitigating evidence' was "central to [the] decision to reverse in *Tennard*").

[67] *See* Petition at 28-29, 30-31.

[68] *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.").

given the lack of any reasonable likelihood that Cole's jurors applied their instructions in a way that prevented them from considering his mitigating evidence.[69]

Moreover, as this Court has held, jurors are presumed to apply their common sense in rendering their verdicts.[70]

> [They] do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.[71]

And Cole has offered no evidence rebutting the presumption that his jurors adhered to both their common sense and the trial court's instructions in rendering their punishment verdict.

To reiterate, the broad punishment-phase special issues in Cole's case encompassed his mitigating evidence.[72] The issues also have a "common sense"[73] core of meaning: Was the killing deliberate? Is there a probability that Cole poses a threat of future dangerousness?[74] Furthermore, the trial court instructed the jury to consider "all of the

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[69] *Boyde v. California* 494 U.S. 370, 380 (1990). *See also Johnson*, 509 U.S. at 368-69 (observing that constitutional error results only if mitigating evidence is unavoidably aggravating within the context of the special issues); *Saffle v. Parks*, 494 U.S. 484, 490-92 (1990) (precluding relief where there was no indication that the jury was "altogether prevented" from giving some effect to the evidence).

[70] *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (recognizing the presumption that the jury follows its instructions).

[71] *Boyde*, 494 U.S. at 380-381.

[72] *See Johnson*, 509 U.S. at 356; *Graham*, 506 U.S. at 463; *Franklin*, 487 U.S. at 168; *Jurek*, 428 U.S. at 266-67.

[73] *Pulley v. Harris*, 465 U.S. 37, 50 n.10 (1984).

[74] Tr 181.

evidence submitted . . . in the full trial of this case" in answering those questions.[75] Certainly, "all of the evidence submitted" includes Cole's mitigating evidence. And if any juror, after considering "all of the evidence" and the court's instructions, "had a reasonable doubt as to whether a Special Issue should be answered 'Yes,'" the punishment charge directed the juror to "vote 'No'" to that special issue.[76]

The prosecution strongly urged that the trial evidence compelled "Yes" answers to both special issues.[77] In response, defense counsel begged for mercy:

> I can't excuse the things that have happened in the past, and I'm not going to. I can't change that. . . . There's no guarantee [that Cole will burn out]. But there's no guarantee that anything else will ever happen. . . . There are a lot of people put in orphan's homes. Some of them turn out good. Some of them turn out bad. And I'm not excusing—I'm not using that for an excuse. That's just a mitigating circumstance. He was shuffled back and forth . . . His mother . . . saw him two times in five years. I have no idea what goes on in Ted's mind. None of you do. But how did that cause him to be at the point he is today? Is that his fault? I don't know.
>
> . . . Maybe [a central nervous system problem] caused some of it. I don't know.
>
> . . . He's been rejected everywhere. The only peace he ever finds is in the penitentiary. . . . He doesn't know how . . . to live out here in the street. . . . And I'm not saying we give him the opportunity. I don't want to give him the opportunity. But on the other hand, it's not right to kill him just to show that killing is wrong. . . .
>
> The right thing to do . . . is to answer those special issues in such a manner that he be sent to prison for life.
>
> . . . .
>
> . . . The State is asking you to kill Ted. Can you in all good conscience do that?

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[75] Tr 176.

[76] Tr 175.

[77] 17 SR 870-9, 883-6.

> Look at all the evidence again. . . . Can we in all good conscience sentence him to death?
>
> Thank you, ladies and gentlemen.[78]

Contrary to Cole's assertion, those comments did not amount to "nullification."[79] Counsel did not ask the jury to ignore the evidence or misapply the law. Instead, counsel properly made an individualized case for mercy that was based on Cole's mitigating circumstances and in line with the trial court's instruction to vote "No" to any special issue that the jurors had a reasonable doubt about after considering "all of the evidence."[80]

Nor did the prosecution place the jury in an "ethical dilemma."[81] As the lower court correctly noted, Cole's prosecutor did not ask the jury to "respond[] falsely to a special issue,"[82] or argue that Cole's circumstances were more aggravating than mitigating.[83]

This Court has not found any constitutional violation under the circumstances this case presents and, absent a nullification instruction in *his* case, Cole's reliance on *Smith* and *Penry II* is misplaced.[84] Both of those cases involve nullification instructions, and neither

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[78] 17 SR 879-83.

[79] Petition at 30.

[80] Tr 175.

[81] *Cole*, 418 F.3d at 508.

[82] *Id.*

[83] *Id.*

[84] *Smith*, 543 U.S. at 48 (explaining that a nullification instruction "'essentially instruct[s] [the jury] to return a false answer to a special issue in order to avoid a death sentence'") (quoting *Penry II*, 532 U.S. at 801); *Cole*, 418 F.3d at 508-9 (distinguishing *Smith* and *Penry II*). *See also Gregg v. Georgia*, 428 U.S. 253, 199 (1976) ("Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.") and *Penry I*, 492 U.S. at 327 ("[S]o long as the class of murderers subject to

case speaks to Cole's situation, where the record supports the lower court's determination that, given its instructions, "the jury could have considered and given effect to Cole's mitigating evidence under the future dangerousness special issue."[85] The complained-of arguments fail to support a grant of relief in this case.

CONCLUSION

Jurek, *Graham*, and *Johnson* remain good law, and Cole has not demonstrated any fatal flaw in the state court's denial of relief or the lower court's AEDPA application. Because the special issues were broad enough to encompass Cole's mitigating evidence, this Court should deny certiorari review.

Respectfully submitted,

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capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant.").

[85] *Cole*, 418 F.3d at 508.

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